IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INCORPORATED, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal From the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant, Maryland and Virginia Milk Producers Association, Inc., appeals from the judgment of the United States District Court for the District of Columbia which became final on January 30, 1959, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINIONS BELOW

The opinions of the United States District Court for the District of Columbia, containing the findings of fact and conclusions of law, are reported at 167 F. Supp.

45, 167 F. Supp 799, and 168 F. Supp. 880. Copies of these opinions are set forth in the Appendix, pp. 1a-34a.

JURISDICTION

This is a civil action brought by the United States under Section 4 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U.S.C. § 4, commonly known as the Sherman Act, and under Section 15 of the Act of October 15, 1914, 38 Stat. 736, as amended, 15 U.S.C. § 25, commonly known as the Clayton Act, to prevent and restrain alleged violations of Sections 1, 2 and 3 of the Sherman Act and Section 7 of the Clayton Act. Partial judgments were entered by the district court on November 10, 1958, January 22, 1959, and January 30, 1959, all of which became final on the latter date. Fed. R. Civ. P., Rule 54(b). Copies of these judgments are set forth in the Appendix, pp. 35a-38a. Notice of Appeal was filed in the district court on March 11, 1959.[1] The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 828 (15 U.S.C. § 29), as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869, 989 (28 U.S.C. § 2101).

The following decisions, *inter alia*, sustain the jurisdiction of this Court to review the judgment on direct appeal: *Northern Pacific Railway Company* v. *United States*, 356 U.S. 1; *International Boxing Club of New York, Inc.* v. *United States*, 358 U.S. 242; *United States* v. *Radio Corporation of America*, 358 U.S. 334.

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[1] The United States also filed a Notice of Appeal, on March 23, 1959.

STATUTES INVOLVED

The statutes under which the action was brought, Sections 1-4 of the Sherman Act and Sections 7 and 15 of the Clayton Act, are set forth in the Appendix, pp. 38a-41a. Appellant's defense of exemption upon which this appeal is based rests principally on Section 6 of the Clayton Act, 38 Stat. 731 (15 U.S.C. § 17) and the Capper-Volstead Act, Act of February 18, 1922, 42 Stat. 388 (7 U.S.C. §§ 291, 292), which are set forth in the Appendix, pp. 40a, 43a-45a.

QUESTIONS PRESENTED

1. Is a duly qualified cooperative association of milk producers deprived of the antitrust exemption conferred by Section 6 of the Clayton Act and the Capper-Volstead Act, and subject to prosecution under:

(a) Section 7 of the Clayton Act, when it expands its operations to the authorized functions of processing and distributing milk by acquiring the assets of a non-exempt dairy corporation, or

(b) Section 3 of the Sherman Act, when it acquires the above assets from a non-exempt dairy corporation pursuant to a purchase contract with normal ancillary covenants by the vendor not to compete within the metropolitan area for a 10-year period, absent a finding that the transaction was part of a combination or conspiracy, or was made for the purpose or with the effect of bestowing an anti-competitive benefit on the non-exempt vendor?

2. Where the Secretary of Agriculture has investigated the acquisition of assets of a dairy corpora-

tion by a cooperative association of milk producers and has advised the Attorney General that he finds no evidence of violation of the Capper-Volstead Act, is the cooperative nevertheless subject to prosecution under Section 7 of the Clayton Act which by its terms (a) is applicable only to asset acquisitions by corporations "subject to the jurisdiction of the Federal Trade Commission" and (b) is inapplicable to "transactions duly consummated pursuant to authority given by . . . the Secretary of Agriculture"?

STATEMENT

On July 26, 1954, the Maryland and Virginia Milk Producers Association (hereinafter referred to as the Association), a cooperative organization of nearly 2,000 milk producers serving the Washington metropolitan area, acquired substantially all of the assets of Embassy Dairy, Inc., a local dealer, or dairy, engaged in the distribution and sale of milk in the Washington metropolitan area. On November 21, 1956, the United States filed a civil antitrust action against the Association. The complaint charged:

(1) that through various anti-competitive practices including the acquisition of dealer outlets, the Association had attempted to monopolize and had monopolized trade and commerce in the supplying of raw milk to dealers for processing and resale as pasteurized fluid milk in the Washington metropolitan area, in violation of Section 2 of the Sherman Act;

(2) that the Association's acquisition of the Embassy assets had and might have the effect of substantially lessening competition or tending

to create a monopoly in the production and sale of raw milk to, and the distribution and sale of pasteurized fluid milk by, Washington metropolitan area dealers, in violation of Section 7 of the Clayton Act; and

(3) that the contracts under which the Association acquired the Embassy assets were made for the purpose of eliminating Embassy as an outlet for raw milk produced by others, and to eliminate competition between Embassy and dealers purchasing raw milk from the Association, in unreasonable restraint of trade and commerce in the Washington metropolitan area in violation of Sections 1 and 3 of the Sherman Act.

On February 7, 1957, the United States amended its complaint under Sections 1 and 3 so as to charge that the Embassy assets were purchased pursuant not merely to a contract but to "an unlawful combination and conspiracy" with the vendor and others to eliminate and foreclose competition in the Washington metropolitan area. On December 10, 1957, the United States further amended its complaint to add the charge that the Association's acquisition of the so-called Richfield-Wakefield Dairy on December 6, 1957, violated Section 7 of the Clayton Act.

The Association, in its answer, denied the alleged violations and, among various affirmative defenses, asserted that it was exempt from prosecution by virtue of the provisions of Section 6 of the Clayton Act and of the Capper-Volstead Act. When the case came on for trial in the Fall of 1958, the court ordered that the question of the Association's asserted exemption from the antitrust laws be tried first. Following the

exemption trial, separate trials were held on the Clayton Act allegations and on those under Sections 1 and 3 of the Sherman Act.

On October 16, 1958, in the first of three opinions, the court ruled that the Association was (1) an agricultural organization "instituted for purposes of mutual help, and not having capital stock or conducted for profit," within the meaning of Section 6 of the Clayton Act (App. 5a); and (2) an association of "persons engaged in the production of agricultural products" as farmers or dairymen, complying with the detailed requirements of Section 1 of the Capper-Volstead Act (App. 6a). The court then ruled as a matter of law that the Clayton and Capper-Volstead Acts rendered the Association

> "entirely exempt from the provisions of the antitrust laws, both as to its very existence as well as to all of its activities, provided it does not enter into conspiracies or combinations with persons who are not producers of agricultural commodities" (App. 11a).

Applying this ruling to the allegations of the complaint, the district court dismissed the monopolization charges under Section 2 of the Sherman Act (judgment dated November 10, 1958, App. 35a) but sustained and ordered to trial the charges under Sections 1 and 3 of the Sherman Act and Section 7 of the Clayton Act.

Following the exemption decision the district court proceeded with a separate trial on the merits of the Section 7 cases. Evidence was adduced both on the competitive effects of the acquisitions and on the Association's exemption defense. On November 21, 1958, the court rejected the claim of exemption and

adjudged the Association's acquisition of Embassy to have violated Section 7 of the Clayton Act; it simultaneously held the acquisition of Richfield-Wakefield to be lawful under the "failing corporation" doctrine established by this Court in *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291. The Association was ordered to divest itself of the Embassy assets and cancel all contracts ancillary to that transaction (App. 14a).

On January 12, 1959, the court conducted a separate trial on the alleged combination and conspiracy under Sections 1 and 3 of the Sherman Act. Both sides presented the case solely on the record of the prior hearings. No evidence was offered by the United States, and the trial court made no finding, that the Association had combined or conspired with anyone to effect the Embassy acquisition, or that any anti-competitive benefit accrued to the vendor of the assets. The trial court on January 14, 1959, nevertheless concluded

> "that the transaction involving the acquisition of Embassy Dairy by the Defendant constitutes a violation of Section 3 of the Sherman Act" (App. 34a).

No additional relief against the Association was ordered under Section 3. On January 22, 1959, judgment was entered on both the Section 7 and Section 3 cases (App. 35a). By judgment dated January 30, 1959, the court dismissed the complaint under Section 1 of the Sherman Act (App. 37a).

This appeal by the Association challenges the validity of the judgment of January 22, 1959, under which the Association's acquisition of the Embassy

assets was found to have violated Section 7 of the Clayton Act and Section 3 of the Sherman Act. In a cross-appeal the United States has challenged (1) the judgment of November 10, 1958, dismissing the monopolization cause of action, and (2) the adequacy of the relief granted on January 22, 1959, with respect to the Embassy acquisition. The United States has not appealed from the judgment sustaining the Richfield-Wakefield acquisitions.

THE QUESTIONS ARE SUBSTANTIAL

This Court has long recognized that farmer cooperatives occupy a special and privileged status in relation to the antitrust laws. *United States* v. *Rock Royal Co-op,* 307 U.S. 533, 560, 563; *Tigner* v. *State of Texas,* 310 U.S. 141; *Associated Press* v. *United States,* 326 U.S. 1, 14. This appeal raises for the first time the question of the extent to which that privilege exempts a cooperative from prosecution for acquiring assets in restraint of trade.

1. The Conflict With Applicable Decisions of This Court

In *United States* v. *Borden Co.,* 308 U.S. 188, this Court, confronted with a "combined attempt of all the defendants, producers, distributors and their allies, to control the market," held that the Capper-Volstead Act's exemption for farmer cooperatives did not extend to "authorizing the sort of conspiracies between producers and others that are charged in this [Sherman Act § 1] indictment." 308 U.S. at 206. Several years later, in *Allen Bradley Co.* v. *Local Union No. 3,* 325 U.S. 797, this Court, relying on *Borden,* held that exempt organizations lose their

antitrust immunity when they "aid and abet manufacturers and traders in violating the Sherman Act." 325 U.S. at 810. Prior to the ruling challenged here, the lower federal courts had consistently interpreted *Borden* and *Allen Bradley* as denying exemption to a labor or agricultural organization only where it engaged in a transaction with non-exempt persons which amounted to a combination or conspiracy with outsiders "who are themselves violating the antitrust laws." *New Broadcasting Co.* v. *Kehoe*, 94 F. Supp. 113, 115 (S.D.N.Y. 1950); *Anderson-Friberg, Inc.* v. *Justin R. Clary & Son*, 98 F. Supp. 75 (S.D.N.Y. 1951); *Courant* v. *International Photographers*, 176 F. 2d 1000 (9th Cir. 1949).

The conflict presented by this appeal is brought sharply into focus by the shifting rulings of the district court in the course of the trial. At the outset, in its October 16, 1958, opinion, the court interpreted *Borden* to mean that an agricultural cooperative is entirely exempt from the antitrust laws "provided it does not enter into conspiracies or combinations with persons who are not producers of agricultural commodities" (App. 11a). Accordingly, the court sustained the Association's exemption defense to the Section 2 charge of monopolizing and attempting to monopolize, since that charge alleged no combination or conspiracy. In so ruling, the court was mindful of the fact that one of the grounds expressly[2] relied on by the United States for that charge was that the Association, with monopolistic intent, had acquired the assets of Embassy Dairy. In the same opinion,

[2] See Particulars furnished by the United States, Nos. b. 14, d. 2, k. 4 (R. 1712, 1713, 1731); and the colloquy between the court and government counsel (R. 622-623).

the court left standing the amended complaint's allegations against the Embassy transaction under Sections 1 and 3 of the Sherman Act because these allegations did charge "combination and conspiracy" (App. 13a), as *Borden* requires. The reasons why the court simultaneously let the Section 7 charge against the Association remain are obscure (App. 13a, 16a).[3]

When the Embassy acquisition went on trial, however, the United States offered no evidence and the court made no finding of conspiracy or combination. Moreover, the United States offered no evidence and the court made no finding that any person other than the Association had violated the antitrust laws or restrained trade in respect of the Embassy transaction. In short, the United States did nothing to substantiate its amendment to the complaint which attempted to transform the Association's acquisition of Embassy from a mere "contract" into an "unlawful combination and conspiracy." Despite this evidential void, the district court held the Association to have lost its exemption and to have violated Section 7 and Section 3. Significantly, however, the court at the close of the evidence rephrased its own interpretation of the *Borden* rule as follows:

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[3] The Court in its October 16th opinion stated:

"The defendant claims that this provision is not applicable to it because the Capper-Volstead Act empowers it to make necessary contracts and agreements to effect its purposes. The Court does not agree with this contention. It is a well-known principle of law that repeals by implication are not favored, and unless there is a clear repugnancy between an earlier and later statute, the two statutes must be so construed as to give effect to each" (App. 13a-14a).

> "an agricultural cooperative was immune from the antitrust laws unless and except when it entered into *transactions* with [outsiders]" (App. 31a, emphasis added).

It was on this basis that the court ruled that "the *transaction* involving the acquisition of Embassy Dairy" violated Section 3 of the Sherman Act (App. 34a).

If transactions with outside parties were sufficient to deprive agricultural cooperatives of their antitrust exemption, Section 6 of the Clayton Act and the Capper-Volstead Act would be idle exercises in legislation. The provisions of those statutes would confer an illusory privilege available only to those who remain dormant. Farmers, like labor, needed no act of Congress in 1914 or 1922 to permit them simply to join an organization. What they sought and obtained was authorization to mobilize their economic power and engage collectively in transactions with outsiders, transactions which inevitably, because of the anti-competitive character of the cooperative venture, would to some degree restrain trade. History demonstrates that these enactments were the outgrowth of prosecutions and threats to impose antitrust sanctions on the collective bargaining of labor with business, the collective entry of farmers into markets of commerce. For these reasons, the district court's equation of "contract" or "transaction" with "combination and conspiracy" under Section 3 is erroneous (*Adams Dairy Company* v. *St. Louis Dairy Company*, 260 F. 2d 46 (8th Cir. 1958), and *United States* v. *Kissel*, 218 U.S. 601), nullifies the statutory exemption, misapprehends the decision in *Borden*, and justifies review by this Court.

The district court's Section 7 ruling also misinterprets *Borden*. Neither that statute, nor the allegation under it, speak in terms of combination or conspiracy. Rather, like the charge under Section 2 of the Sherman Act, the allegation under Section 7 of the Clayton Act was directed solely against the conduct of a single party—the acquiring corporation. The district court, however, shifted its ground. Although it had previously dealt with the Embassy acquisition as non-conspiratorial action entitling the Association to exemption under Section 2, it turned around and treated the same acquisition as joint action with an outsider disqualifying the exemption as to Section 7. Moreover, the court destroyed the doctrine that the Clayton Act attacks in its incipiency conduct which, when full blown, will violate the Sherman Act, S. Rep. 1775, 81st Cong., 1st Sess. (1950). Under the district court's decisions, attempts to monopolize and the achievement of monopoly by a cooperative are properly acknowledged to be exempt from the Sherman Act; yet identical conduct alleged only as tending to monopoly or lessening competition is prohibited by the Clayton Act. Such conflicts between the court's own Sherman and Clayton Act rulings on the identical set of facts point up the departure from *Borden* and add impetus to the need for review by this Court.

2. The Distortion of the Capper-Volstead Act

By holding that the Association, apart from combination or conspiracy, had restrained trade in violation of the Sherman and Clayton Acts, the district court wholly misconstrued the purpose of the Capper-Volstead Act. It treated the enforcement scheme

provided in Section 2 of Capper-Volstead as a mere supplement to the arsenal of antitrust remedies available against the non-conspiratorial conduct of cooperatives. In so doing, it treated Capper-Volstead as having precisely the opposite effect from that intended by Congress.

We contend that, absent participation in a combination or conspiracy, Section 2 of the Capper-Volstead Act was designed to provide the exclusive procedure by which antitrust remedies could be brought to bear upon cooperative activity adversely affecting competition. Our contention in this respect is wholly in accord with the opinion announced by this Court in *United States* v. *Radio Corporation of America*, 358 U.S. 334, where the determination of whether FCC approval of a station transfer precluded antitrust attack by the Department of Justice was shown to depend upon an examination of the intention of Congress in enacting the Communications Act.

Because this Court in *Borden* found that the cooperative had exceeded its immunity by joining in a conspiracy with others, there was no occasion in that case for reviewing Capper-Volstead to ascertain the application of its provisions to acts by a cooperative association standing alone. Such a review, appropriate here, would disclose a remarkable legislative history. The debates in two Congresses, when read in their entirety, irresistibly compel the conclusion that Capper-Volstead, as finally enacted, was intended to clarify the Clayton Act exemption so as authoritatively to remove cooperatives acting alone from the threat of antitrust prosecution initiated by the Department of Justice; that they were to be placed instead under the initial juris-

diction of the Secretary of Agriculture; that monopoly or restraint of trade by a cooperative was not to be actionable unless "the price of any agricultural product is unduly enhanced by reason thereof"; but that once such finding of undue enhancement was made by the Secretary, the full arsenal of antitrust remedies was to be available against the cooperative in a district court, with prosecution to remedy "the monopolization or restraint of trade" placed in the hands of the Attorney General.

This legislative design is abundantly confirmed by a careful examination of the language of Section 2 of Capper-Volstead, and comparison with provisions of the Clayton Act as they stood in 1922. Such a study discloses that the Clayton Act, in Sections 11 and 15, had established a dual system of enforcement under which the Federal Trade Commission, by agency proceedings subject to court of appeals review, and the Department of Justice, by original equity actions in a district court, could each proceed with antitrust enforcement. In drafting Section 2 of the Capper-Volstead Act, Congress amalgamated the dual remedies of Sections 11 and 15 into a single cohesive and consecutive procedure to govern all cases involving charges of monopolization or restraint against cooperatives acting alone. Justice Department equity enforcement was to follow, rather than be alternative to, quasi-judicial proceedings by an agency. And Congress, after debating the choice of the quasi-judicial agency, explicitly rejected the Federal Trade Commission in favor of giving the Secretary of Agriculture the right to initiate and conduct proceedings involving cooperatives, because of the Secretary's greater familiarity with agricultural practices and prices (62 Cong. Rec. 2279).

The United States conceded below that no finding of violation of Capper-Volstead by the Secretary of Agriculture preceded its complaint, and that the Attorney General had not been requested by the Secretary of Agriculture to proceed against the Association (Defendant's Exhibit 67). By proceeding apart from the means prescribed by Section 2 of Capper-Volstead, the district court turned Capper-Volstead upside down and interpreted it simply as a statute by which Congress designed a third antitrust enforcement vehicle, to impose on cooperatives alone concurrent liability to prosecution by three federal agencies — Justice, Federal Trade Commission and Agriculture. It is to undo this distortion of a law designed to aid agricultural cooperatives that review by this Court is sought.

3. The Specific Exclusion of Acquisitions by Cooperatives From Amended Section 7 of the Clayton Act

The last paragraph of Section 7 of the Clayton Act, added by amendment in 1950, provides that

> "Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board."

Prior to the decision below, those provisions of the paragraph which deal with the Secretary of Agri-

culture had never been judicially interpreted. At trial, the Association argued that the inclusion of the Secretary in that paragraph had been designed by Congress to exclude acquisitions by farmer cooperatives from the prohibitions of Section 7. The court rejected this contention on the grounds that (1) no statute expressly empowered the Secretary to approve any acquisition, and (2) the acquisition was not authorized by the Secretary (App. 29a).

The lower court's ruling effectively nullifies the pertinent part of Section 7, since no statute, to our knowledge, gives the Secretary of Agriculture specific authority to approve any acquisition at all. A review of the background of this provision would demonstrate, however, that in 1922 Congress through Section 1 of the Capper-Volstead Act expressly authorized producer cooperatives to integrate vertically by permitting them to make contracts necessary to engage collectively in the successive functions of "processing, preparing for market, handling, and marketing" (App. 43a); that Congress in 1926 established a Division of Cooperative Marketing (now the Farmer Cooperative Service) to render services to producer associations engaged in all phases of cooperative marketing (7 U.S.C. § 452 *et seq.*); that in this very case the Farmer Cooperative Service rendered favorable assistance in connection with the Association's acquisition of the Embassy facilities (Defendant's Exhibits 19, 65); that Congress in 1929 passed the Agricultural Marketing Act "to promote the effective merchandising of agricultural commodities . . . by encouraging the organization of producers into effective associations . . . for greater unity of effort in marketing" (12 U.S.C. § 1141(a)), and therein

explicitly directed the Farm Credit Administration to make loans to cooperatives for "the construction or acquisition . . . of physical facilities" (12 U.S.C. § 1141e(a)(2)); and that in this very case the Embassy facilities were acquired by the Association with a loan granted pursuant to that statutory directive (Defendant's Exhibit 20).

Against this background it is highly significant to note that the prohibition which Congress added to Section 7 of the Clayton Act in 1950 itself contained an important limitation, underscored below, by providing that

> "no corporation *subject to the jurisdiction of Federal Trade Commission* shall acquire the whole or any part of the assets of another corporation, etc."

As previously noted, Congress in 1922 had expressly rejected an amendment to Capper-Volstead which would have placed cooperatives under the jurisdiction of the Federal Trade Commission (62 Cong. Rec. 2279). By this legislative history, as well as by precedent, *Fruit Growers' Express, Inc.* v. *Federal Trade Commission*, 274 Fed. 205 (7th Cir. 1921), the Federal Trade Commission has antitrust jurisdiction only over those industries not specifically subject to the jurisdiction of a specialized agency. Accordingly, Section 7's prohibitive language does not reach agricultural cooperatives which, being subject to the Capper-Volstead jurisdiction of the Secretary of Agriculture, are removed from the jurisdiction of the Federal Trade Commission.

It should not be surprising then to find that the last paragraph added to Section 7 in 1950 was intended to

exclude cooperatives whose activities were subject to the Secretary's authority. As stated at page 7 of the House Report 1191 (81st Congress, 1st Session):

> "The last paragraph of section 7 is new. It simply provides that provisions of the bill *should not apply to corporations coming under the jurisdiction of* ICC, CAA, FCC, FPC, SEC, and *the Secretary of Agriculture.* These agencies already have jurisdiction over these corporations, and there is no disposition to change the present arrangement regarding them" (emphasis added).[4]

Review by this Court is needed to restore to Section 7 the meaning which Congress intended.

4. The Impact on Cooperatives

The ruling below raises questions of substantial importance to the growth and legality of the agricultural cooperative movement in the United States.

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[4] This amendment was inserted in 1950 after testimony was given in committee hearings by the Secretary of National Cooperative Milk Producers Federation. Representing 83 farmer-owned and farmer-controlled dairy cooperatives collectively owning approximately 800 dairy plants, he urged a specific exclusion for Capper-Volstead cooperatives, stating:

> "The legislation proposed to this committee may not be aimed at agricultural cooperatives. Yet the bill, as drawn, is subject to interpretations which would nullify rights accruing to farmer cooperatives under the Capper-Volstead Act, would wipe out the power of the Secretary of Agriculture, a technically informed and naturally understanding agency, to determine whether cooperative activities have begun to run counter to public interest, and relegate farmers to the conditions of uncertainty which prevailed prior to the passage of the act." Hearings Before Subcommittee No. 2 of the Committee on the Judiciary, House of Representatives, on H.R. 515, page 104 (80th Cong., 1st Sess.).

For more than forty years farmers have been authorized by Congress and encouraged by the Department of Agriculture to combine in cooperative organizations for—in the words of the Capper-Volstead Act—"collectively processing, preparing for market, handling, and marketing" their products. Because of their effectiveness in combating the perennial problem of low prices for farm products, farmer cooperatives have become a commonplace in the agricultural economy of our country: "three out of every five farmers are now members of supply or marketing associations."[5] In recent years, the Department of Agriculture, through the Secretary, the Farmer Cooperative Service, the Farm Credit Administration and others, has actively encouraged farmers to build bigger cooperatives and has, in turn, spurred cooperatives to merge for greater strength and to integrate vertically for greater control over the marketing of farm products.[6]

The policy advocated by the Department bears no idle relation to the facts of this case. The undisputed evidence showed that funds with which to consummate the Embassy purchase were in fact loaned to the Association by the Baltimore Bank for Cooperatives

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[5] Speech delivered by Secretary of Agriculture Benson to the American Institute of Cooperation, August 25, 1958 (USDA 2364-58), page 8.

[6] *Ibid.* Secretary Benson stated:

> "It is often in their own cooperatives that farmers have the best means of making vertical and other forms of integration work for them. I urge you cooperative leaders: Broaden your services to take care of the major needs of producers—provide the needed processing and marketing facilities . . ."

(Defendant's Exhibit 20), a federal agency, pursuant to the provisions of the Agricultural Marketing Act of 1929, after receipt of an analysis by the Dairy Branch, Farmer Cooperative Service, Department of Agriculture, of the advantages and disadvantages of the transaction (Defendant's Exhibit 19). Moreover, the evidence showed that this prosecution of the Association was undertaken by the Department of Justice after the Secretary of Agriculture had advised the Attorney General that his Farmer Cooperative Service rendered advisory assistance prior to the acquisition, stating that

> "the purchase was made for the purpose of enabling the cooperative to gain better information regarding the retail market; to bargain more effectively; and to serve its members more advantageously" (Defendant's Exhibit 65).

The decision below produces a dramatic conflict between coordinate branches of the federal government on the application of acts of Congress—antitrust and agricultural cooperation—which themselves inherently conflict in their basic premises. Review by this Court is essential to define the permissible scope of agricultural cooperative integration and safeguard farmer cooperatives from prosecution by the Department of Justice for following the advice of the Department of Agriculture.

CONCLUSION

The questions presented are substantial and of considerable importance to the farmer cooperative movement throughout the United States. For these reasons we respectfully urge that probable jurisdiction be noted.

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Section 7	41a
Section 15	42a
Capper-Volstead Act:	
Section 1	43a
Section 2	44a

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 4482-56

UNITED STATES OF AMERICA, *Plaintiff*,

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INCORPORATED, *Defendant*.

Opinion of October 16, 1958

HOLTZOFF, District Judge.

This is a civil action brought by the United States against the Maryland and Virginia Milk Producers Association, Incorporated, under the antitrust laws, for injunctive and other similar relief. Among the defenses pleaded by the defendant are assertions that under the Clayton Act and the Capper-Volstead Act the defendant, as an agricultural cooperative organization, is exempt and immune from the provisions of the anti-trust laws in respect to the activities of which the government complains. A further defense is that the Secretary of Agriculture has primary jurisdiction of one of the activities concerning which complaint is made. Pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A., the Court has ordered a separate trial of these defenses in view of the fact that if they are sustained in whole or in part they may be finally dispositive of either the entire litigation or some aspects of it.

The complaint is not divided into separate counts, as the Rules permit, but it in effect sets forth three separate claims for relief or causes of action. Although they are not separately numbered in the complaint, they are in fact distinct.

The first cause of action, contained in Paragraphs 21, 22, and 23 of the complaint, alleges that the defendant has attempted to monopolize and has monopolized interstate trade and commerce in supplying milk for resale as fluid milk in the area comprising the District of Columbia and certain regions in Maryland and Virginia adjoining the District of Columbia. This cause of action is based on Section 2 of the Sherman Act, 15 U.S.C.A. § 2, which reads as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor."

The second cause of action, pleaded in Paragraphs 24, 25, 26, 27 and 28 of the complaint, charges a combination and conspiracy to eliminate and foreclose competition in the Washington metropolitan area by making and carrying out a contract for the transfer to the defendant of substantially all of the assets of a concern known as the Embassy Dairy, which is a retail outlet for milk in the Washington metropolitan area. This cause of action is predicated on Sections 1 and 3 of the Sherman Act. Section 1 of the Sherman Act, 15 U.S.C.A. § 1, reads as follows, insofar as is pertinent to the issues of this case:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Section 3 of the Sherman Act, 15 U.S.C.A. § 3, reads, in part, as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal."

The third cause of action is found in Paragraphs 29 and 29(a) of the complaint, and charges that the defendant on July 26, 1954, purchased and acquired substantially all of the assets of the Embassy Dairy and that the effects of this acquisition have been and may be substantially to lessen competition or to tend to create a monopoly in the production and sale of milk to dealers in the Washington metropolitan area. It is further charged that with the same effect the defendant on December 6, 1957, purchased and acquired all of the outstanding stock of Richfield Dairy Corporation and Simpson Brothers, Incorporated. This cause of action is founded on Section 7 of the Clayton Act, 15 U.S.C.A. § 18, the pertinent portions of which read as follows:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

As a result of lengthy and detailed discovery proceedings, as well as by proof at the trial, the following pertinent facts that are relevant to the defenses now being tried have been developed. The defendant, Maryland and Virginia Milk Producers Association, Incorporated, is a

Maryland corporation having its principal office in the District of Columbia. It is an agricultural cooperative association, having as members nearly two thousand milk producers, that is, persons owning or operating dairy farms at which milk is produced, most of the members being located in the States of Maryland and Virginia. The milk is delivered by the members to the defendant, which acts as the marketing agency for them. Most of the milk is sold eventually to dealers in the Washington metropolitan area. The defendant also owns a plant at which it transforms surplus milk into various milk products, such as ice cream. These by-products are shipped to other markets. The net worth of the defendant corporation is approximately five million dollars. Most of its members are natural persons. Some, however, are partnerships and some are corporations. Some of the members devote all or a major portion of their time and energy to operating their dairy farms themselves. Some of them operate their farms through employees and are engaged principally in other occupations.

The defendant claims to be exempt from the provisions of the antitrust laws under two distinct statutes. The first is Section 6 of the Clayton Act, which became law on October 15, 1914. Its pertinent portions, 15 U.S.C.A. § 17, read as follows:

> "Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, institnted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

The second statute under which immunity is claimed is Section 1 of the Capper-Volstead Act, which became law

on February 18, 1922. This provision, 7 U.S.C.A. § 291, reads as follows:

> "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however*, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:
>
> "First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,
>
> "Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.
>
> "And in any case to the following:
>
> "Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members."

The first question to be determined is, whether these two statutes, or either of them, are applicable to this defendant. So far as the Clayton Act is concerned, it comprehends within its scope all agricultural organizations instituted for the purposes of mutual help and not having capital stock or conducted for profit. Unquestionably, the defendant is an agricultural organization. It is instituted for the purposes of mutual help because it acts as the marketing agency for all of its members and pays over to its members the proceeds of the milk sales, with a deduction, of course, for overhead and similar expenses. The defendant does not have capital stock and it is not conducted for profit except as such profit may accrue to its members.

Clearly, therefore, the defendant is within the scope of the Clayton Act.

The next query is, whether it is within the scope of the Capper-Volstead Act, which has been quoted. As has been stated, that statute authorizes persons engaged in the production of agricultural products as farmers or dairymen to act together in associations, corporate or otherwise, with or without capital stock. It is urged by the government that the words "dairymen" and "farmers" should be restricted to natural persons who personally work on dairy farms and who derive the major portion of their income from the farms. The Court sees no basis for such a restricted definition. The owner or operator of a dairy is a dairyman, whether he personally works on his dairy or has the work done by employees. So, too, the owner of a farm may be regarded as a farmer even though he devotes the major portion of his activities to other pursuits. When Congress desired to put a more circumscribed definition on the term "farmer" it do so expressly, as is true of the Bankruptcy Act, 11 U.S.C.A. § 1 et seq. The Court, therefore, is of the opinion that it is immaterial whether every member of the association personally works on his farm or whether every member of the association is a natural person or a corporation. Under these circumstances, the Court concludes that the defendant corporation is of the type that is comprehended within the terms of the Capper-Volstead Act.

The next question is, whether it qualifies under the provisos contained in the Act. Taking first the third proviso, because that is applicable to all corporations, claiming the benefits of the statute, namely, that the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members, it is not disputed that this condition is met. As to the first and second provisos, the law does not require compliance with both but merely with either one. The first proviso imposes a condition that no member of the

association shall be allowed more than one vote. The proof shows that this condition has been met. It therefore becomes unnecessary to decide whether the second proviso is also complied with. The Court, consequently, reaches the conclusion that the defendant corporation is entitled to the benefits of both the Clayton and Capper-Volstead Acts and to the exemptions and immunities conferred by those two statutes.

We then reach the main question to be determined, whether these exemptions and immunities are sufficiently broad to cover the activities of which the Government complains. This brings us back to the precise provisions of, first, the Clayton Act, and then the Capper-Volstead Act.

Section 6 of the Clayton Act, on which the defendant relies, 15 U.S.C.A. § 17, provides in its pertinent clauses that:

> "Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of agricultural * * * organizations instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

If we compare these provisions with the provisions of Section 1 of the Capper-Volstead Act, 7 U.S.C.A. § 291, which has been quoted above, we reach inescapably the conclusion that in effect the Capper-Volstead Act adds nothing to the immunities and exemptions of the Clayton Act except to extend them to corporations having capital stock and except to make the provisions of the earlier statute more definite and specific. How far the exemptions and immunities of the two statutes extend is a question of novel impression. Although the Clayton Act was

enacted as far back as 1914 and the Capper-Volstead Act as far back as 1922, this question has not been definitely determined and is still open. Perhaps this circumstance is due to the fact that but few attempts have been made to prosecute agricultural cooperatives.

First and foremost, the two statutes provides that an agricultural cooperative shall not as such be considered an illegal combination or conspiracy in restraint of trade under the antitrust laws. In other words, such organizations are not per se illegal combinations or conspiracies in restraint of trade. This much is not disputed. There is a controversy, however, as to whether the statutes should be construed as not being limited to covering the mere existence of agricultural cooperatives but as extending to all of the activities of such cooperatives in connection with their legitimate agricultural business. An examination and scrutiny of the provisions of the statutes are required in order to solve this problem.

At the outset, it must be noted that the Clayton Act exempts from the antitrust laws the existence and operation of such organizations. It is not limited to their existence but includes both existence and operation. Moreover, the last clause of the Clayton Act provides that such organizations or members thereof shall not be held or construed to be illegal combinations or conspiracies in restraint of trade. If that clause stood alone, we would be confronted with a different situation. But it is quite apparent that the Congress, in enacting the Clayton Act, covered not only the existence of such organizations but also their activities and operations and exempted both from the antitrust laws.

The same result is reached by an examination of the Capper-Volstead Act, which authorizes persons engaged in the production of agricultural commodities to join together in associations and authorizes such associations, and their members to make necessary contracts and agreements to

effect their purposes. Obviously, the Capper-Volstead Act is not limited to granting immunity to such associations in respect solely to their existence but extends likewise to their activities.

Support for this conclusion is derived from the reports of Congressional committees in respect to the legislation involved in this case. Chairman Clayton of the House Committee on the Judiciary, in a report dated May 6, 1914, House Report No. 627, 63d Congress, 2d Session, states, on page 36:

> "The object of Section 7 is to make clear certain questions about which doubt has arisen as to whether or not fraternal, labor, consumers, agricultural, or horticultural organizations, orders, or associations, organized for mutual help, not having capital stock or conducted for profit, come within the scope and purview of the Sherman antitrust law."

At page 38 he says that Section 7 of the bill will:

> "Recognize as legal the existence and operations of fraternal, labor, consumers, agricultural, or horticultural organizations, orders or associations, organized for purposes of mutual help, and not having capital stock or conducted for profit."

And then he adds:

> "It also guarantees to individual members of such organizations, orders, or associations, the right to pursue without molestation or legal restraint the legitimate objects of such association."

The report of the Senate Judiciary Committee, filed by Senator Culberson on July 22, 1914, Senate Report 698, 63rd Congress, 2d Session, contains the following statement:

> "The other important and general purposes of the bill are to exempt labor, agricultural, horticultural, and other organizations from the operation of the antitrust acts."

The Government argues that the exemption and immunity from antitrust laws conferred upon agricultural cooperatives should be deemed to extend to certain types of restraints but not to others. To say that it should extend only to reasonable restraints would be fallacious because no legislation was necessary to permit reasonable restraints of trade. They are not banned under the antitrust acts. Consequently, if any restraints are immune from the antitrust acts as a result of the legislation we are considering, they must be unreasonable restraints of trade. The Government argues, however, apparently, that some unreasonable restraints, possibly mild in character, should be permitted, whereas those that are more reprehensible and perhaps predatory should not be deemed exempt or immune under either the Clayton Act or the Capper-Volstead Act. There is no basis in the statutes, however, for separating unreasonable restraints that would otherwise come within the provisions of the antitrust acts into two categories and concluding that some come within the exemption and others do not. To reach any such result would be for this Court to legislate by amending an act of Congress. This the Court cannot do because the Congress itself has not done it.

There are indeed well-recognized limitations on the immunities and exemptions granted by the legislation. The exemptions are accorded and immunities are conferred on agricultural cooperatives and their activities. When they step outside of their field and conspire with persons who are not producers of agricultural commodities, they are beyond the scope of the exemptions. This was held by the Supreme Court in United States v. Borden Company, 308 U.S. 188, 204, 60 S. Ct. 182, 84 L.Ed. 181, which was followed by the Court of Appeals for this Circuit in United States v. Maryland & Virginia Milk Producers Association, 85 U.S. App. D.C. 180, 182, 179 F.2d 426, where it was pointed out that a combination of producers and distributors, the latter not being within the terms of the statutes, is not privileged.

This distinction was formulated by this Court in United States v. Maryland Cooperative Milk Producers, Inc., 145 F. Supp. 151, 153-154, where the Court stated:

> "The obvious purpose of the Clayton Act was to liberate combinations of farmers and their cooperative organizations from the prohibitions of the antitrust laws as long as they do not combine with others who are outside of this category."

The Government relies on the cases of Local 36 of International Fishermen & Allied Workers v. United States, 9 Cir., 177 F.2d 320, 332, and Gulf Coast Shrimpers and Oystermans Association v. United States, 5 Cir., 236 F.2d 658, 664-665. Each of these decisions, however, is distinguishable. The former involved a combination of fishermen and dealers and, therefore, a combination within the ban of the Borden case. The latter presented a situation in which the association did not act as an agency for its members but in which sales were made directly by members to dealers.

It must be mentioned in passing that, of course, the exemptions and immunities extend only to provisions of the antitrust acts. They do not confer any right to violate any other statute, criminal or civil. Also, it must be borne in mind that the exemptions and immunities relate solely to activities in connection with agricultural products. If an organization such as the defendant should step outside of that field and carry on business in products of a different nature, then the provisions of the Clayton and Capper-Volstead Acts would not apply.

Subject to these exceptions, the Court is of the opinion that an agricultural cooperative is entirely exempt from the provisions of the antitrust laws, both as to its very existence as well as to all of its activities, provided it does not enter into conspiracies or combinations with persons who are not producers of agricultural commodities. The public does have another remedy against what would other-

wise constitute violations of the antitrust laws. Section 2 of the Capper-Volstead Act prescribes a procedure whereby the Secretary of Agriculture may institute administrative proceedings and seek enforcement of his orders in the courts if he finds that such an association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced. Obviously, this remedy is applicable in only a limited group of cases and the public is not sufficiently protected against restraints of other kinds. Moreover, an agricultural cooperative is apparently not subject to suit by a private person, as is the case with others whose activities come in conflict with the antitrust laws. Thus, it would seem that under the law as it now stands, an agricultural cooperative may monopolize articles of food and unreasonably restrain commerce in such commodities and the public receives no protection from the antitrust laws except in a very limited way.

The Court is not unmindful of the fact that there may be serious dangers lurking to the public weal in this situation if a cooperative becomes too large or grows too powerful. This possibility was pointed out on the floor of the Senate by the opponents of the Capper-Volstead bill, but without avail. Monopolies and restraints of trade are abhorrent to the genius of Anglo-Saxon jurisprudence and its institutions. Monopolies and unreasonable restraints of trade in the necessities of life such as food are particularly obnoxious.

This subject is obviously within the jurisdiction of the Congress alone. For this Court to construe this Act in any other way than that in which it has been framed by the Congress would be to amend the statute. Courts, however, may not legislate. Sometimes, indeed, there is a strong temptation for a court to do so and there have been occasions in which the temptation has not been overcome, but it must be resisted at all hazards. By bringing this suit the Government may have conferred a benefit on

the public in that it has definitely pointed out a problem for the Congress to solve.

The Court, therefore, reaches the conclusion that the Government has no valid claim for relief under Section 2 of the Sherman Act and, therefore, the first cause of action alleged in the complaint will be dismissed on the merits. This brings us to the second and third causes of action, which relate to the acquisition of the assets of Embassy Dairy as well as the stock of the Richfield Dairy Corporation and of Simpson Brothers, Incorporated. The second cause of action alleges a violation of Sections 1 and 3 of the Sherman Act. It charges a conspiracy with certain persons who are not engaged in agricultural pursuits as defined in the statutes. These allegations are clearly within the exception of the Borden case and, therefore, a cause of action is stated in respect to these activities.

The third cause of action relates to the acquisition of the assets of Embassy Dairy and capital stock of Richfield Dairy Corporation and Simpson Brothers, Incorporated, and charges violations of Section 7 of the Clayton Act, 15 U.S.C.A. § 18, the pertinent portions of which have already been quoted. In brief, the statutory provision here involved prohibits any corporation engaged in interstate commerce to acquire the whole or any part of the capital stock of any other corporation likewise engaged in interstate or foreign commerce, and further prohibits any corporation subject to the jurisdiction of the Federal Trade Commission to acquire the whole or any part of the assets of another corporation engaged in interstate or foreign commerce if the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly.

The defendant claims that this provision is not applicable to it because the Capper-Volstead Act empowers it to make necessary contracts and agreements to effect its purposes. The Court does not agree with this contention. It is a

well-known principle of law that repeals by implication are not favored, and unless there is a clear repugnancy between an earlier and later statute, the two statutes must be so construed as to give effect to each.

It is the opinion of the Court that the provisions of Section 7 of the Clayton Act, 15 U.S.C.A. § 18, constitute a limitation on the authority of an agricultural cooperative to make contracts as authorized by the Capper-Volstead Act.

The Court has no doubt that the defendant corporation is subject to the jurisdiction of the Federal Trade Commission, 15 U.S.C.A. § 45, and, consequently, within the terms of Section 7 of the Clayton Act.

The Court, therefore, reaches the conclusion that the second and third causes of action averred in the complaint are valid.

In conclusion, the first cause of action will be dismissed on the merits and the trial will proceed only as to the second and third causes of action.

A transcript of this oral decision will constitute the findings of fact and conclusions of law on the aspects of the case that were tried at this hearing.

[Caption Omitted]

Opinion of November 21, 1958

HOLTZOFF, District Judge.

This is a civil action brought by the United States against the Maryland and Virginia Milk Producers Association, Incorporated, under the antitrust laws, for injunctive and similar relief. While the complaint, which relates to the milk industry in the Washington Metropolitan area, is not technically divided into separate counts, it in effect sets forth three separate claims for relief or causes of action. The first cause of action charges an attempt to

monopolize interstate trade and commerce in supplying milk for resale as fluid milk in the Washington Metropolitan area, comprising the District of Columbia and nearby regions of Maryland and Virginia. This cause of action is based on Section 2 of the Sherman Act, 15 U.S.C.A. § 2. The second cause of action charges a combination and conspiracy to eliminate and foreclose the competition above-mentioned by making and carrying out a contract for the transfer to the defendant of substantially all of the assets of a concern known as Embassy Dairy, Incorporated, which is a retail outlet for milk in the area. This cause of action is predicated on Sections 1 and 3 of the Sherman Act, 15 U.S.C.A. §§ 1, 3. The third cause of action which has been the subject matter of the present section of the trial, charges that the defendant on July 26, 1954, acquired substantially all of the assets of Embassy Dairy, Incorporated, and that the effects of this acquisition have been or may be substantially to lessen competition or to tend to create a monopoly in the production and sale of milk to dealers in the Washington Metropolitan area. This cause of action further charges that, with the same effect, the defendant on December 6, 1957, purchased and acquired all of the outstanding capital stock of Richfield Dairy Corporation and Simpson Brothers, Incorporated, which operated the Wakefield Dairy. This cause of action is founded on Section 7 of the Clayton Act, 15 U.S.C.A. § 18. The pertinent provision of that section is found in its first paragraph, and reads as follows:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

The defendant is an agricultural cooperative association, having as members nearly two thousand milk producers, that is, persons operating dairy farms at which milk is produced. As an affirmative defense the defendant pleaded that it is immune and exempt from prosecution under the antitrust laws under Section 6 of the Clayton Act, 15 U.S.C.A. § 17, and Section 1 of the Capper-Volstead Act, 7 U.S.C.A. § 291. The Court directed a separate trial of this affirmative defense. The outcome of the separate trial was that the Court, D.C., 167 F. Supp. 45, reached the conclusion that the defense of immunity was valid as to the first cause of action, on the ground that activities of agricultural cooperative associations are expressly exempted by statute from prosecution under the antitrust laws, either in criminal or civil proceedings. The Court further held, however, that this immunity does not extend to contracts or combinations involving, in addition to agricultural cooperatives, any person or concern that is not an agricultural cooperative association and, therefore, not entitled to exemption. On this basis, the Court held that the defense of immunity did not apply to the second and the third causes of action. The Court further held that the Capper-Volstead Act did not exempt agricultural cooperative associations from the provisions of Section 7 of the Clayton Act, to which reference has been made.

After a short recess, the trial was then resumed as to the third cause of action, and has just been concluded. The Court might observe at this juncture that, as a result of the efforts of counsel and the commendable cooperation between them, the various discovery weapons provided by the Federal Rules of Civil Procedure, 28 U.S.C.A., have been used in this litigation to the utmost extent. Requests for admissions numbering 1624 were submitted by the plaintiff and 211 such requests were submitted by the defendant. The great majority of these requests resulted in admissions. Interrogatories were used to a considerable degree and stipulations were made as to authenticity of

documents. In addition, numerous stipulations of facts were entered into, some at a series of pretrial hearings and others outside of the courtroom. The result of this enlightened course of procedure has been that the factual disputes have been reduced to a minimum and the amount of evidence introduced at the trial was greatly diminished in volume, thereby shortening the trial by a considerable extent.

The issues arising out of the third cause of action are now before the Court for decision. Section 7 of the Clayton Act, which has been heretofore quoted, as originally enacted was limited to acquisitions of capital stock. By an amendment enacted on December 29, 1950, the Act was extended so as to cover acquisitions of assets as well. In addition, the amendment generally broadened the phraseology of the statute. In 1950 it became sufficiently comprehensive and inclusive in its terms so as to bring under its ban both horizontal and vertical acquisitions, either of capital stock or of assets of other concerns. In this connection it might be said that by "horizontal" acquisition is meant the acquisition or control of one competitor by another; while the word "vertical" is applied to an acquisition or control by a concern in one echelon, of a concern in another echelon in the same line of trade or commerce, such as a transaction between a manufacturer and a jobber or between a wholesaler and a retailer or between a manufacturer or dealer and a customer.

The statute was construed recently by the Supreme Court in United States v. E. I. duPont de Nemours & Company, 353 U.S. 586, 77 S. Ct. 872, 1 L. Ed. 2d 1057. The facts of that case were unique. In 1917 duPont and Company acquired a considerable block of stock of General Motors Corporation. Obviously, the two corporations were not competitors and were not engaged in the same line of business. DuPont and Company, however, was selling certain commodities, such as fabrics, that were used in the manufacture of automobiles. Among the customers

for these products was General Motors Corporation. The latter purchased some of these products from duPont and some from other manufacturers and dealers. In 1949 the Government brought a civil suit attacking the stock acquisition on the ground that it violated Section 7 of the Clayton Act, in that it tended to lessen competition between duPont and other dealers in similar products, all of whom were selling or endeavoring to sell their goods to General Motors Corporation. The Court held that the transaction violated Section 7 of the Clayton Act.

In discussing the construction to be accorded to the statute, the Court held that it was immaterial whether actual restraints or monopolies in fact resulted from a merger or an absorption condemned by the Clayton Act or in fact whether there was actually a substantial lessening of competition. The Court went even further and held that it was immaterial whether a substantial lessening of competition was intended. The test formulated in the duPont case was whether there was a reasonable probability that a substantial lessening of competition or a monopoly might result from the acquistion by one corporation of the capital stock or the assets of another corporation. On this point the Court said, 353 U.S. at page 589, 77 S. Ct. at page 875:

> "The section is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred or are intended."

In order to be within the ban of the statute, it is, of course, necessary that there be reasonable probability of a lessening of competition or the creation of a monopoly within an area of effective competition. The market affected must be substantial and it must appear that competition may be foreclosed in a substantial share of that market. The Court expressly held that the Act applies both to horizontal and to vertical acquisitions.

So, too, the Court also indicated that the fact that all concerned acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company, and without any design to overreach anyone, does not defeat the right of the Government to relief. Finally, the Court held, for the purposes of the case before it, that the test was whether at the time of the institution of the suit, and not necessarily at the time of the acquisition of the capital stock or assets, there was reasonable probability that the transaction was likely to result in the condemned restraints.

It must be observed that the duPont case was decided by a vote of four to two, with three members of the Court abstaining from participation. A query, therefore, arises whether this decision should be regarded only as *res judicata* as between the parties to it or whether it sets forth binding principles as well on the basis of *stare decisis*. We do not have the views of any five members of the Court on the questions decided in the duPont case.

The biggest bone of contention in that case, however, was whether the legality of the acquisition challenged by the Government may be judged by the situation existing as of the time of the institution of the suit instead of as of the date of the transaction. In the duPont case suit was instituted over thirty years subsequently to the transaction assailed by the Government. In this respect the case, if it should become a binding precedent, introduces a far-reaching innovation and a novel doctrine into the law, since ordinarily the validity of a person's acts or transactions is determined as of the date when they are performed or consummated and when the cause of action arises rather than as of some later time fortuitously or arbitrarily selected by the institution of suit. Fortunately, this is a question that does not concern us in the instant case, since here the Government contends that the challenged transaction was illegal as of its date, as well as of a subsequent time, and the Court is called upon to deter-

mine the issues as of the date of the original transaction and, of course, in the light of subsequent events. Moreover, unlike the suit in the duPont case, in this instance the action was brought within a reasonable time after the challenged transaction. The accused merger took place on July 26, 1954, and the original complaint in this case was filed on November 21, 1956.

Going on to the facts that must govern the disposition of this controversy, the case relates to the Washington Metropolitan area, as has been stated, which consists of the District of Columbia and nearby Maryland and Virginia. This area constitutes a separate market for the retail distribution of milk. The defendant, Maryland and Virginia Milk Producers Association, Incorporated, is a Maryland corporation, having its principal office in the District of Columbia. As has been stated, it is an agricultural cooperative association, having as members nearly two thousand dairy farmers, most of whom are located in Maryland and Virginia. The milk is delivered by the members to the defendant, which acts as the marketing agency for them. Most of the milk is sold eventually to dealers in the Washington Metropolitan area. The defendant also owns a plant at which it transforms surplus milk into various milk products, such as ice cream and powdered milk. The net worth of the defendant corporation is approximately five million dollars.

For the purpose of determining the price to be charged to customers and the price to be paid by the Association to its members, the milk is divided into three categories. So much as is resold to the ultimate consumers in liquid form is placed in Class I; so much as is converted into cream or cottage cheese forms Class II; and the balance, known as surplus milk, which is transformed into other by-products, such as ice cream and powered milk, is denominated Class III. The commodity in Class I and Class II is known in the trade as fluid milk. Different prices are charged to the customer for milk in each of the

three groups, Class I receiving the highest and Class III receiving the lowest price. Since all milk delivered to the Association by its members forms a single pool, figuratively speaking, out of which all sales are made, it is impossible to allocate specific quantities to each of the three classes out of each member's contribution. Accordingly, a so-called "blend" price is ascertained on the basis of the proportions of total sales made by the Association in each class out of the aggregate amount sold during a specified period. The Association then pays its members on the basis of the "blend" price, after deducting a percentage, of course, for its maintenance and operating expenses. Manifestly, the more milk that can be sold in Class I and the less in Class III, the greater will be the "blend" price and the more profitable the returns to the members.

A considerable quantity of milk supplied by defendant to its customer-dealers was resold to the Government for use by personnel at Government establishments within the Washington Metropolitan area, such as military and naval stations, Government hospitals, and other institutions. These sales were made by contracts based on competitive bidding. This aspect of the industry, though minor in proportion, was nevertheless of some importance, as Government purchases in the market amounted to about two million dollars a year.

In the Washington Metropolitan area approximately 86 per cent of all sales of fluid milk to dealers were made by the defendant, and about 45 per cent of sales to Federal establishments were made by dealers who procured their supply from the defendant. There were about a dozen dealers, or dairies as they are sometimes called, in the area. All but four purchased the bulk of their supply of fluid milk from the defendant. Among them were the three largest dairies. Embassy Dairy, Incorported, the fourth largest, was an independent concern and did not buy from the defendant but procured its supply directly

from farmers who, in turn, did not sell to the defendant. Wakefield Dairy, a smaller establishment, followed the same course as Embassy.

Embassy sold to Federal installations over 47 per cent of all Government purchases as against about 45 per cent supplied by dealers who, in turn, purchased from the defendant. Embassy obtained such a large share of the Government business by cutting prices and frequently submitting bids lower than those of defendant's dealer customers. Embassy bought its milk from about 122 independent dairy farmers, as against the almost 2000 farmers who were members of the defendant Association. The purchases of Embassy for resale as fluid milk amounted to about 9.5 per cent of the milk supply reaching the Washington Metropolitan area.

In the spring of 1954 negotiations were initiated between the defendant and Embassy Dairy, Incorporated, for the acquisition of all of the assets of Embassy Dairy by the defendant Association. While the Government is not required to establish the defendant's motive or intent in entering into this transaction, nevertheless, evidence of motive or intent is admissible as it may possibly cast an illuminating light on what actually transpired. Chief Justice Hughes said, in Texas & N. O. Railroad Co. v. Brotherhood of Railway & S. S. Clerks, 281 U.S. 548, 549, 559, 50 S. Ct. 427, 430, 74 L. Ed. 1034, that:

> "Motive is a persuasive interpreter of equivocal conduct."

In memoranda not intended for public consumption but evidently prepared for private circulation among the directors and members of the Association, as well as for submission to a financial institution from which it was desired to borrow money needed to consummate the transaction, the defendant's general manager frankly, candidly, and without guile or equivocation and without attempt at

euphemism, set forth the aims of those who were guiding the destinies of the Association.

In a memorandum dated May 9, 1954, which was introduced in evidence as Plaintiff's Exhibit 22, he said:

> "As of April 1, 1954, 1926 farmers were members of the Association. These 1926 farmers were shipping approximately 208,000 gallons of milk daily, which is better than 90 per cent of the entire Metropolitan Washington milk supply. The average farmer markets in excess of 100 gallons of milk daily."

Again, he said, in the same memorandum:

> "The Association's customers are the large retail dairies in the Washington Metropolitan area. However, from time to time it happens that these dairies do not absorb the entire amount of milk delivered by the members. In this event the Association undertakes to sell this excess in other markets. This excess is a normal incident to the operation of the cooperative, the reason being that in order to be sure of an adequate supply it must maintain an excess over and above past average requirements."

Further, he stated:

> "We believe that the net return to the members is superior to that in any other market, costs of production being taken into consideration."

In the same memorandum he said:

> "The benefits expected from the acquisition of Embassy Dairy are as follows:
>
> "1. Elimination of bootlegging, i.e., bringing in cheap uninspected 'distress' milk from other markets.
>
> "2. The elimination of this 'bootleg' milk will allow our own milk to replace it, to the great increase of the blend price.
>
> I will skip Number 3 as immaterial.
>
> "4. Increase in members estimated at 60 to 70 new producers (now selling to Embassy).

"Embassy Dairy does between 8 and 9 million dollars annual business, which business the Association will get and in large part retain. Assuming, however, it loses some of this business, it will lose it to other local dairies who buy from the Association and so the Association would retain the sale of this milk."

And finally this memorandum makes the following significant statement:

"The purchase of Embassy Dairy will eliminate a disturbing influence which has been a thorn in the side of the Association for many years, which the local Health authorities apparently have been unable to control. Acquisition of Embassy Dairy cannot be other than helpful and profitable to the Association."

A memorandum dated June 2, 1954, also prepared by the general manager of the defendant, which has been introduced in evidence as Plaintiff's Exhibit 21, contained somewhat similar statements. The pertinent portions read as follows:

"The Embassy Dairy has for the past 15 years been the major factor involved in the attempts to weaken and destroy the Milk Act of 1925 [D.C. Code 1951, § 33-301 et seq.]."

After making some statements that are here immaterial, the writer goes on as follows:

"In addition to being the leader in the attempts to circumvent and modify the Milk Act and the accompanying regulations, the dairy, through its ability to buy cheap milk both from unlicensed sources and from independent Washington producers, has cut into the market structure to the extent that they have taken considerable sales away from dealers buying milk through the Association.

"As the result of their ability to under-buy the market and thus take away business from dealers purchasing their milk through the Asociation they have, as a result, reduced the Association's Class I sales and

therefore caused additional surplus to the members of this Association. We estimate that this has amounted to about $700,000 a year loss in revenue to Association producers.

"The effect upon the producer milk checks has not been limited to this loss of sales, but extends to even a greater amount to the contract milk bidding. There is approximately 14,000 gallons of contract milk a day in this Metropolitan market. This milk would normally be classified as Class I and be sold to the distributors at the Class I price. As the result of the dairy's ability to under-buy, therefore under-cut in their bidding, it has been necessary for the Association to drop the contract price to a competitive level, that is, to the price that Embassy is able to buy their milk."

And again the writer says:

"By acquiring this dairy the Association can immediately pick up approximately 8,000 gallons of milk sales for its members for which the dairy has been buying the milk from other than licensed producers on the market."

About six months after the transaction was consummated, the Secretary-Treasurer of the Association expressed similar sentiments in a letter that he wrote to an officer of a similar association in Detroit, Michigan. This letter, dated February 8, 1955, which was introduced in evidence as Plaintiff's Exhibit 48, contains the following statement:

"The first plant we 'inherited' in 1940 was a small one that we had to take over as the result of bankruptcy. The second one which we have just taken over as of August 1, 1954, was one that we felt we had to buy for self protection; the former owners of which had repeated their activities once executed in the Chicago market and since 1930 in the Washington market to the extent that from our standpoint everyone in the distributing field would be happy to have them out of the market. It did give us an additional outlet for a sizable amount of milk which we did not have under prior conditions inasmuch as they were buying independent milk."

The negotiations between the defendant and Embassy Dairy, Incorporated, culminated on July 26, 1954, by a conveyance of the assets of Embassy to the Association, including all of its tangible property, both real and personal, as well as intangible assets. The Embassy Dairy then immediately went out of business. The evidence indicates that the price paid by the Association for the transfer was far in excess of the actual intrinsic value of the property purchased. To be sure, the rosy prospects previously depicted did not materialize and the optimistic expectations of those in control of the Association were not fully realized. Nevertheless, they were at least partially attained. Apparently the continued existence of several comparatively small dairies kept alive considerable competition in the industry.

After the absorption of Embassy by the defendant, the latter undertook the retail business previously conducted by Embassy, in addition to continuing the functions of the Association as a wholesaler. Many of the independent producers who had supplied Embassy were unable to find an outlet for their product in the Washington market unless they were willing to surrender their independent status and join the Association. Some of them, indeed, pursued the latter course, thereby augmenting the defendant's membership. A large proportion of them, however, began to ship to a Baltimore dealer. Thus, one result of the transaction was that a portion of the fluid milk supply was diverted from the Washington to the Baltimore market, while another consequence was an increase in the amount of milk coming into the defendant's hands.

A still further sequel of the transaction was the elimination of the largest single outlet in the Washington Metropolitan area for milk produced by independent producers. Immediately after the Embassy acquisition 91.7 per cent of the milk purchased by the Federal government originated directly or indirectly from the defendant, as against 45 per cent that it had indirectly supplied previously.

The Embassy Dairy was eliminated completely as a factor from this competitive business.

Thus, the result of the acquisition of Embassy by defendant tended to lessen competition in the milk industry in the Washington market in more ways than one. It diminished competition for the purchase of milk from producers by eliminating one large independent purchaser; it reduced competition for sales to Government establishments by excluding a rival that had been in the habit of cutting prices and under-bidding dealers who bought from the Association, and it tended to create a monopoly by concentrating a larger proportion of the milk supply reaching the Washington area in the hands of the defendant, thereby augmenting the defendant's control or, at least, influence on the market.

It must, indeed, be observed that defendant did not achieve a complete monopoly, for several comparatively small independent dealers still stayed in the market and even prospered. The law, however, is not aimed only at complete monopolies or directed solely at entire elimination of all competition. It is sufficient if the acquisition, merger, or absorption tends to lessen competition or tends to create a monopoly. The conclusion is inescapable that the transaction challenged by the Government in respect to the Embassy Dairy led to each of these consequences. Without doubt, the result was that the defendant enhanced its dominating position in the market, even though it did not attain complete control.

It is argued by able counsel for the defendant that the acquisition of Embassy by the defendant did not reduce the number of dealers in the market but merely resulted in the substitution of another dealer for the one who had been eliminated, in that the business previously conducted by Embassy was taken over and continued to be operated by the defendant, in addition to the defendant's business as a wholesale distributor. Ingenious as this line of reason-

ing is, it does not solve the problem. The transaction constituted much more than the replacement of one dealer by another. It was the absorption of the business of the largest independent dealer by the biggest wholesaler in the area and combining the affairs of the two concerns into a single operation, thereby augmenting the influence of the latter in the market and getting rid of a troublesome rival.

So, too, it is no answer to say that milk prices in the area did not climb to a higher level subsequently to the transaction. Prices are affected and influenced by numerous imponderable factors. It is within the realm of possibility that prices might have fallen were it not for the acquisition of Embassy by the Association. The subject of price fluctuations is a topic concerning which the Court cannot speculate.

As an affirmative defense the defendant invokes the last paragraph of Section 7 of the Clayton Act, which reads as follows:

> "Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79 of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board."

Stripping this provision of those portions that are not material to the issues in the case at bar, the pertinent language is reduced to the following:

> "Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Secretary of Agriculture under any statutory provision vesting such power in such Secretary."

In support of this defense, defendant introduced evidence to the effect that it applied to a Government financial institution, known as the Baltimore Bank for Cooperatives, for a loan to enable it to carry out the purchase of the Embassy assets and that after scrutinizing the merits of the proposed transaction the Bank made the loan requested by the defendant. The defendant further introduced evidence to the effect that the Marketing Division of the Farmer Cooperative Service of the Department of Agriculture looked into the desirability of the transaction and expressed a favorable opinion.

This evidence does not sustain the defense, for two reasons. First, the statute above quoted exempts only such transactions as are consummated pursuant to authority given by the Secretary of Agriculture "under any statutory provision vesting such power in such * * * Secretary". Admittedly, however, there is no statutory provision empowering the Secretary of Agriculture to approve any transaction such as is involved here. Second, the transaction was not authorized either by the Secretary of Agriculture or by anyone acting in his behalf. The acts and statements of Government officials on which the defendant relies are not sufficient to constitute statutory sanction. Even if they should be deemed to be such representations as might form a basis for an estoppel as between private individuals, this circumstance cannot aid the defendant. It is elementary law that the Government cannot be estopped by statements or acts of any of its officers or agents. Authorities supporting this principle and applying it are legion. Suffice it to cite two old decisions of the Supreme Court from which the later authorities are derived and on which they are based, In re Floyd Acceptances, 7 Wall. 666, 676, 19 L. Ed. 169; and Wisconsin Central Railroad Co. v. United States, 164 U.S. 190, 210, 17 S. Ct. 45, 41 L. Ed. 399.

The Court, therefore, concludes that the acquisition of the assets of Embassy Dairy, Incorporated, by the defend-

ant, constituted a violation of Section 7 of the Clayton Act and that, consequently, judgment should be rendered compelling the defendant to divest itself of these assets and cancelling all contracts ancillary to the transaction.

A different problem arises in connection with the acquisition of the capital stock of the Richfield-Wakefield Dairies. There are two concerns involved, one known as Richfield, the other one Wakefield. At the time in question, the Richfield Corporation was out of business, but owned and controlled the stock of Wakefield Corporation, or rather Simpson Brothers, Incorporated, which operated the Wakefield Dairy. The evidence establishes without contradiction that at the time when the capital stock of these two corporations was purchased by the defendant the two companies were hopelessly insolvent and were deeply in debt. The defendant was a very large creditor, for an amount exceeding $300,000, for unpaid milk bills. The Wakefield Dairy was in fact on the brink of bankruptcy.

The acquisition of capital stock or assets of a failing corporation is not within the ban of Section 7 of the Clayton Act. While the statute does not expressly so provide, this conclusion is inherent in the statutory provision because the acquisition of a failing corporation that is on the verge of going out of business cannot result in lessening competition or in creating a monopoly. Be that as it may, the Supreme Court so held in International Shoe Co. v. Federal Trade Commission, 280 U.S. 291, 298, 50 S. Ct. 89, 74 L. Ed. 431.

The Court concludes, therefore, that the acquisition of the capital stock of the Richfield Dairy Company and Simpson Brothers, Incorporated, was not violative of Section 7 of the Clayton Act.

This opinion will constitute the findings of fact and conclusions of law.

Judgment will be rendered adjudging the acquisition by the defendant of the capital stock of Richfield Dairy

Company and Simpson Brothers, Incorporated, to be valid; and further adjudging the acquisition by the defendant of the assets of Embassy Dairy, Incorporated, and the contracts ancillary thereto, to be invalid as in violation of Section 7 of the Clayton Act. The judgment will require the defendant to divest itself within a reasonable time of all assets acquired from Embassy Dairy, Incorporated, and will direct the cancellation of all contracts ancillary to the acquisition. The judgment will further direct the defendant to file a report within sixty days and at such other times as the Court may order, setting forth what steps are being taken to carry out this judgment. The judgment will also provide that applications may be made at the foot of the decree.

Counsel will submit a proposed judgment.

[Caption Omitted]

Opinion of January 14, 1959

The Court: As has been heretofore indicated, the complaint in this civil action brought by the United States against the Maryland and Virginia Milk Producers Association, Inc., under the antitrust laws, is in effect divided into three separate claims for relief or causes of action.

At the first section of the trial, the Court upheld the defense of immunity to the first cause of action, in that the Defendant, being an agricultural cooperative, was immune from the anti-trust laws unless and except when it entered into transactions with persons or organizations that themselves did not possess such immunity, that is, were not agricultural cooperatives.

The trial then proceeded as to the third cause of action, which was predicated on the Clayton Act. That section of the trial concluded with a decision in favor of the Gov-

ernment to the effect that the transaction involving the acquisition by the Defendant of Embassy Dairy, Inc. was a violation of Section 7 of the Clayton Act, and with a decision in favor of the Defendant in respect to similar acquisition of Richfield and Wakefield Dairies.

The Government then requested that the Court proceed to a decision under the second cause of action, which also attacked the Embassy Dairy transaction, but based the attack on the Sherman Act, instead of on the Clayton Act.

It was stipulated that the case, in so far as this cause of action was concerned, would be submitted on the same record as that before the Court at the trial on the first and third causes of action.

The Court, therefore, readopts the findings of fact that it has heretofore made.

In addition to that, it is going to make a few additional findings, largely of the nature of ultimate findings based upon the evidentiary findings heretofore made.

First, the Court finds as a fact that the result of the transaction complained of was a foreclosure of competition, in respect to Government contracts and in respect to purchases of milk from milk producers.

The Court further finds as a fact that the transaction complained of was entered into with the intent and purpose of restraining trade.

In the light of the decision of the Supreme Court in United States v. Griffith, 334 U.S. 100, 105, the Court does not regard it as necessary to find a specific intent to restrain trade in order to reach the conclusion of law that the antitrust laws have been violated. Nevertheless, the Court does make hereby such a finding of fact.

The Court further concludes that an unreasonable restraint of trade, violative of the Sherman Act, has resulted from the acquisition of Embassy Dairy by the Defendant.

It has been urged in behalf of the Defendant that the transaction involved in this case is within the immunity accorded to agricultural cooperatives. The basis of this argument is that the doctrine which bans immunity in respect to transactions entered into between agricultural cooperatives and organizations that are not such cooperatives should be limited to such transactions as result in a competitive advantage to the other party to the transaction, that is, the party which is not clothed with the immunity.

The Court does not find any authoritative basis for such a distinction. The general doctrine limiting the immunity in the manner heretofore stated was formulated and enunciated by the Supreme Court in United States v. Borden Company, 308 U.S. 188, 204.

There is nothing in that case intimating that any such limitation as is now suggested should exist. This Court finds no authoritative or binding expression formulating such a qualification.

True, some expressions are cited from a number of District Court cases involving transactions of labor unions which tend to support the reasoning advanced on behalf of the Defendant in this respect.

Entirely aside from the fact that those expressions are not binding on this Court, it must be noted that the decisions involving labor union transactions are governed by a somewhat different principle than those which apply to agricultural cooperatives.

To be sure, the same provision of law grants an immunity from the antitrust laws to agricultural cooperatives as to labor unions; but in addition to that, other statutes, such as the Norris-La Guardia Act, and the National Labor Relations Act, the Labor-Management Act, add certain additional privileges to labor unions that are not accorded to agricultural cooperatives. It necessarily follows, therefore, that decisions involving labor unions are not nec-

essarily apposite as to this point when an agricultural cooperative is involved.

In this connection, it is appropriate to call attention to the decisions of the Supreme Court in United States v. Hutcheson, 312 U.S. 219, and in Allen Bradley Company v. Local Union No. 3, 325 U.S. 797, 806, in which it was held expressly that:

> "The Sherman Act, the Clayton Act and the Norris-La Guardia Act must be jointly considered in arriving at a conclusion as to whether labor union activities run counter to the antitrust legislation."

Naturally, an agricultural cooperative can derive no benefit from the statutes relating to labor unions.

The Court, therefore, reaches the conclusion that the statutory immunity accorded to agricultural cooperatives does not apply to the transaction here involved.

In respect to the main issue here presented for decision, it has been held by the Supreme Court that it is unreasonable per se to foreclose competitors from any substantial market. International Salt Company v. United States, 332 U.S. 392, 396; United States v. Griffith, 334 U.S. 100, 107.

In addition, the case of United States v. Yellow Cab Company, 332 U.S. 218, generally supports the conclusion that is being reached here.

The Court concludes that the transaction involving the acquisition of Embassy Dairy by the Defendant constitutes a violation of Section 3 of the Sherman Act.

This oral opinion will constitute the findings of fact and conclusions of law. Counsel will prepare a judgment in accordance with the ruling and in the form indicated in the opinion rendered in this case on November 21, 1958.

[Caption Omitted]

Judgment

This cause coming on to be heard upon defendant's third, fourth, fifth and sixth affirmative defenses as to which the Court ordered a separate trial under the provisions of Rule 42(b) FRCP, and defendant having withdrawn its sixth affirmative defense, it is this 10th day of November, 1958

ADJUDGED, ORDERED AND DECREED, That the third (*Capper-Volstead Act* § 1) and fifth (*Clayton Act* § 6) affirmative defenses be and they are hereby severally sustained as to the cause of action pleaded in Paragraphs 21, 22 and 23 of the last amended complaint, and the said cause of action is hereby dismissed, with prejudice.

The Court adopts as its findings of fact and conclusions of law its Opinion filed herein October 16, 1958.

By the Court

/s/ ALEXANDER HOLTZOFF
Judge

[Caption Omitted]

Final Judgment

This Court having conducted a separate trial as to plaintiff's causes of action stated in Paragraphs 29 and 29A of the Complaint as amended and having rendered its opinion thereon dated November 21, 1958; and having conducted a further separate trial as to plaintiff's causes of action stated in Paragraphs 24 to 28, inclusive, of the Complaint as amended and having rendered its opinion thereon dated January 14, 1959; and each of said opinions containing the Court's Findings of Fact and Conclusions of Law, it is this 22nd day of January 1959, hereby

ADJUDGED, ORDERED AND DECREED THAT:

1. The acquisition by defendant of certain assets of Embassy Dairy, Inc. on or about July 26, 1954, and the contracts ancillary thereto, were and are in violation of Section 7 of the Clayton Act (15 U.S.C. § 18).

2. The acquisition by defendant of the capital stock of Richfield Dairy Corporation, and Simpson Bros., Inc., trading as Wakefield-Model Farms Dairy, was not and is not in violation of Section 7 of the Clayton Act and the cause of action relating thereto is dismissed with prejudice.

3. The contract of May 26, 1954, pursuant to which defendant acquired certain assets of Embassy Dairy, Inc., and the ancillary contracts were and are in violation of Section 3 of the Sherman Act (15 U.S.C. § 3).

4. Within one (1) year from the date hereof the defendant shall dispose of as a unit and as a going dairy business all assets of Embassy Dairy, Inc., tangible and intangible, which it acquired on July 26, 1954, and replacements therefor.

5. The divestiture herein ordered shall be in good faith and shall require the prior approval of this Court on notice to counsel for plaintiff. Within sixty (60) days from the date hereof the defendant shall report to the Court its efforts to carry into effect the divestiture herein ordered. Further reports shall be made to this Court every ninety (90) days thereafter and on such other dates as this Court may order.

6. Pending divestiture, defendant shall administer the assets acquired from Embassy Dairy, Inc., and replacements therefor, in good faith as a going dairy business with a view to preserving the said assets in as good condition as possible, ordinary wear and tear excepted. For legitimate business purposes, present assets may be replaced by other assets of substantially equal value. If deemed advisable

in the operation in good faith of the said dairy business, capital improvements may be made. The sale of any capital asset of a value in excess of $10,000 shall require the prior approval of the Court.

7. So much of the contracts by and between defendant and Embassy Dairy, Inc., Green Spring Dairy, Inc., Green Spring Milk Company, Homestead Dairy Products Company, James J. Ward, James J. Ward, Jr., John Ward and R. Jeanne Ward, respectively, made on or about May 26, 1954, as provide that for a period of ten years the aforementioned persons will not engage in the sale or distribution of milk, cream or other dairy products in an area consisting of the District of Columbia and adjacent parts of the States of Maryland and Virginia, are hereby declared invalid and defendant is enjoined and restrained from enforcing or claiming any rights under such provisions.

8. Jurisdiction of the causes of action stated in Paragraph 29 and Paragraphs 24 to 28, inclusive, of the Complaint as amended is retained for the purpose of enabling either of the parties to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, and for the enforcement of compliance therewith and punishment of violations thereof.

9. Neither party shall be allowed costs.

/s/ Alexander Holtzoff
Alexander Holtzoff
United States District Judge

[Caption Omitted]

Order

Upon motion of the plaintiff, the Court being fully advised in the premises, it is this 30th day of January, 1959, hereby

ORDERED that the claims for relief under Section 1 of the Sherman Act, 15 U.S.C. § 1, pleaded in Paragraphs 24, 25, 26, 27, and 28 of the complaint herein, as amended, be and they hereby are dismissed.

/s/ ALEXANDER HOLTZOFF
Alexander Holtzoff
United States District Judge

STATUTES INVOLVED

1. The Sherman Act: Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. §§ 1, 2, 3 and 4).

Section 1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5 as amended and Supplemented, of the act entitled "an act to create a Federal Trade Commission to define its powers and duties, and for other purposes," approved September 26, 1914: *Provided further,* That the preceding pro-

viso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 2:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 3:

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on

conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 4:

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

2. The Clayton Act: Act of October 15, 1914, 38 Stat. 730, as amended.

Section 6 (15 U.S.C. § 17):

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Section 7, as amended, 64 Stat. 1125 (15 U.S.C. § 18):

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or

short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

Section 15 (15 U.S.C.A. § 25):

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations

of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and supoenas to that end may be served in any district by the marshal thereof.

3. The Capper-Volstead Act: Act of February 18, 1922, 42 Stat. 388 (7 U.S.C. §§ 291, 292).

Section 1:

Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members.

Section 2:

If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association to cease and desist from monopolization or retraint of trade. On the request of such association or if such asso-

ciation fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to the pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer or agent thereof engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association, and such service shall be binding upon such association, the officers, and members thereof.